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ALEXANDER L. STEVAS
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No. 83-1958

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GEORGE C. ROGERS,

Petitioner,

v.

LOCKHEED GEORGIA COMPANY, and AERONAUTICAL MACHINISTS LODGE 709, IAM&AW,

Respondents.

BRIEF OF AERONAUTICAL MACHINISTS LODGE 709 IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

The only question presented by the Petition for Certiorari is whether this Court intended (but failed to state) that its decision in *Del Costello v. Teamsters* and *Steelworkers v. Flowers*, ____ U.S. ____, 103 S. Ct. 2281, 76 L.Ed.2d 476 (Nos. 81-2386 and 81-2408, June 8, 1983) should have only prospective application.

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IN THE

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October Term, 1983

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BRIEF OF AERONAUTICAL MACHINISTS LODGE 709 IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

I.

STATEMENT OF THE CASE

A. Preface

In their appeals to the Eleventh Circuit, both Lockheed and Lodge 709 asserted that the District Court Opinion and Judgment were unauthorized by the facts and contrary to law. Since this fact is not reflected in the largely immaterial Statement in the Petition for Certiorari, we are compelled to make the following largely immaterial, but brief, statement of facts.

B. Statement Of Facts

The appellee, George C. Rogers, was first employed by Lockheed Georgia on July 12, 1965, and, except for two layoff periods, worked continuously at the company's Marietta plant until layoff in January, 1977. R. 422. He forfeited his seniority by failing to respond to a notice of recall from layoff mailed to him on June 20, 1978. He was rehired by Lockheed Georgia on March 9, 1979, was promoted to a supervisory position in October 1980, and is still employed by the Georgia Company. R. 423; TR 53, 58-59, 254-55. This hybrid breach of duty--301 action was filed in the District Court on March 21, 1980.

On May 1, 1981, the Union filed a Motion for Summary Judgment upon the basis that the action was time-barred. (R. 467). This motion was not ruled upon and was renewed at trial. The action was tried June 26-29, 1981, without a jury. On September 30, 1981, the trial court entered Findings of Fact and Conclusions of Law [1] and entered Judgment against the defendants. (R. 631-37). The Court did not address the timeliness issue.

The Union filed motion for reconsideration and again urged that the action had not been timely filed. (R. 640). The motion was denied (R. 669-70) and thereafter Lockheed Georgia and Lodge 709 appealed (R. 671).

Several weeks after his January, 1977, layoff Mr. Rogers learned of and applied for an opening in Tehran, Iran, with Lockheed Air Services ("LAS") which is a separate and independent division of the Lockheed Cor-

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[1] The trial court's conclusions of law were identical to proposed conclusions submitted by the plaintiff prior to trial and were challenged on appeal. See *Amstar Corp. v. Domino's Pizza, Inc.*, 615 F.2d 252, 258 (5th Cir.), *cert. denied*, 449 U.S. 899 (1980).

poration. (Tr. 26-27). Rogers was employed by LAS in March 1977. By virtue of his previous layoffs Rogers admittedly was familiar with the change of address requirements imposed upon laid-off employees by Lockheed Georgia's contract with the Union. (R. 62-63).

The contract provides:

> An employee shall lose his seniority upon the happening of any one of the following events: . . .
>
> * * *
>
> (3) If, after a layoff, the employee is notified to report for an interview for work, by certified mail, or telegram, addressed to him at his address on record at time of layoff (or to the last subsequent address delivered by certified mail, telegram, or in person to the Employment Office of the plant), and fails within one (1) week after notification or such additional time as the Company may grant either to report for an interview or to deliver to the Company a reasonable excuse for failure to report.

Plf. Exhibits 17 and 18, Part B-Art. IV, Sec. 8; also R. 632-33.

The contract also provides:

> Failure on the part of an employee to keep the Company informed of his correct address and telephone number relieves the Company of the responsibility of any notification required by this agreement.

Plf. Exhibits 17 and 18, Part B-Art. VII, Sec. 8.

Despite his admitted awareness of the change of address requirements, Mr. Rogers prior to leaving for Iran failed to fill out the customary "change of address form" provided by Lockheed-Georgia or otherwise to assure that the Company had been notified officially of his change of address. (Tr. 62-65).

In June, 1978, Lockheed Georgia began to recall laid-off employees. On June 20, 1978, Lockheed sent a recall notice to Mr. Rogers offering him reemployment. This notice was sent to Rogers' Powder Springs, Georgia, address. That address was the only address which he had on file with the Company. (Tr. 220-222). Rogers, in Tehran, Iran, at that time, did not respond to this notice of recall within seven days. (Tr. 222-224). On June 29, 1978, Lockheed notified Rogers by letter at his Powder Springs address that because of his failure to respond, he had forfeited his seniority and recall rights under the collective bargaining agreement. (Tr. 222-224).

Prior to this attempt of Lockheed to recall Mr. Rogers, Vice President Moody of Lodge 709 learned that the Company planned to recall Mr. Rogers and that Mr. Rogers had failed to change his address at the Lockheed personnel office. (Tr. 260-61). Mr. Moody contacted two company personnel officials and requested that, in addition to sending Mr. Rogers' notice to his Georgia address, they also attempt to reach him in Iran. (Tr. 261-63). Since such additional notification was not required by the collective bargaining agreement, the Company declined to do so. (Tr. 262). Mr. Moody also spoke to a relative of Mr. Rogers and urged that he attempt to reach Mr. Rogers in Iran. (Tr. 260-61).

On July 3, 1978, Mr. Rogers returned to Georgia on a three-week vacation and learned of his recall notice and the subsequent loss of his seniority rights (Tr. 33-34). On the first day Lockheed's employment office was open after the July 4, 1978 holiday, Mr. Rogers went in person to the employment office to discuss the recall notice and his loss of seniority (Tr. 34-35). During his vacation in Georgia, Mr. Rogers also discussed his loss of seniority

with Union Vice-President Moody (R. 633). Mr. Moody advised Mr. Rogers that in sending the recall notice to the address on file with the Company, Lockheed had not breached the collective bargaining agreement. (Tr. 263, 41-42).

Although the Union had successfully handled grievances which he had filed in the past, Mr. Rogers did not file a grievance prior to his return to Iran following his vacation. (Tr. 67). In February, 1979, because of political turmoil in Iran, Mr. Rogers was evacuated from Iran to the United States and on March 9, 1979, accepted reemployment with Lockheed Georgia in an entry-level job. As a newly-hired employee, Mr. Rogers received a new seniority date. (Tr. 44-45). After Mr. Rogers reported to work for his reemployment, he discussed his loss of seniority with a Union steward who suggested that he file a grievance (Tr. 44-48). The Union steward filled out the grievance form, Mr. Rogers signed it on or about March 16, 1979, and the steward submitted it to the Company. (Tr. 67). The Company rejected Mr. Rogers' grievance on the basis that it was untimely. (Tr. 205-07).[2]

The Union agreed that Mr. Rogers' grievance was untimely and also determined that it lacked merit; therefore, the Union did not process it beyond the first step of the grievance procedure. (Tr. 280-81; 294-95).

The Union and the Company were in agreement that the collective bargaining agreement required the Com-

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[2] Part B, Article III, Sec. 1, of the Union contract provides that grievances arising from discharge shall be signed by the employee and filed within 10 days after discharge. Failure to respond to recall notice has been mutually interpreted to be synonymous with discharge. Rogers had actual notice of his termination and could have filed a timely grievance while at the plant in early July, 1978. (Tr. 36, 241-42, 250, 281).

pany to send notices of recall only to the address which an employee maintained on file with the Company and that it was the employee's responsibility to notify Lockheed of changes of address either in person or by certified mail or telegram. (Tr. 222-24, 263, 280-81, 286, 295).

The District Court found that the Union had processed grievances similar to that of Mr. Rogers on behalf of two other employees. Each of those employees, however, had filed properly filled out change of address forms and had failed to receive their recall notices through no fault of their own. (Tr. 282-88).

Shortly after the Union withdrew his grievance, Rogers filed an unfair labor practice charge with the National Labor Relations Board in which he charged the Union with a breach of its duty of fair representation in failing to process his grievance further (Tr. 69). On June 4, 1979, the Board's General Counsel refused to issue a complaint against the Union because the Regional Director determined that Mr. Rogers' grievance had not been timely filed. (Tr. 69-70). This action was filed a year later, on March 21, 1980.

II.

REASONS WHY THE WRIT SHOULD BE DENIED

A. No Substantial Conflict In Circuit Decisions

As of this writing, since the *Del Costello* decision [3] in June, 1983, nine circuit courts have decided whether the decision applied to pending cases and thus had "retroactive" application. Eight circuits [4] have decided affirma-

[3] *Del Costello v. Teamsters Union*, ____ U.S. ____, 103 S. Ct. 2281, 76 L.Ed.2d 476 (June 8, 1983).

[4] Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits.

tively and one [Ninth] has decided negatively. In addition two circuits [First and D.C.] have acknowledged the decision and distinguished it from cases *sub judice*. Only the Tenth Circuit has no reported decision which cites or discusses *Del Costello*. The circuit court decisions are listed and categorized in the Appendix of Decisions, *infra*.

Consequently, there is no substantial conflict between the circuits upon the question presented in this case.[5]

B. *Del Costello* Rule Was Made Retroactive From Its Inception In Order To Advance Its Purposes

As was noted by the Third, Fifth and Eleventh Circuits in their decisions specifically holding that the *Del Costello* rule should be applied to pending cases,[6] it is a "general rule of long standing . . . that judicial precedents normally have retroactive as well as prospective effect."[7] *National Association of Broadcasters v. FCC*, 554 F.2d 1118, 1130 (D.C. Cir., 1976). That "general rule" is a rule of necessity because when the law is found and declared by the Court in the case under review, the rule of law which is found and declared is applied in that case; otherwise, the rule of law would be *obita dicta*. See historical discussions in *Linkletter v. Walker*, 381 U.S. 618, 621-29, 85 S.Ct.

[5] Petitioner's assertion that Third and Sixth Circuit decisions create conflict is incorrect. *Pitts v. Frito-Lay, Inc.*, 700 F.2d 330 (6th Cir., 1983) was decided several months before the *Del Costello* decision was issued; and *Scott v. Teamsters Union Local 863*, 725 F.2d 226 (3rd Cir., 1984) gives retroactive application to the *Del Costello* rule.

[6] *Perez v. Dana Corporation*, 718 F.2d 581, 584 (3rd Cir., 1983); *Edwards v. Sea-Land Service, Inc.*, 720 F.2d 857, 859 (5th Cir., 1983), conforming to ___ U.S. ___, 77 L.Ed.2d 1360, June 1983; *Rogers v. Lockheed Georgia Co.*, 720 F.2d 1247, 1249 (11th Cir., 1983).

[7] "Retroactive" connotes application to cases pending in which judgments remain subject to review but not to the reopening of closed proceedings. *Linkletter v. Walker*, 381 U.S. 618, 621-29, 85 S. Ct. 1731, 14 L.Ed.2d 601 (1965).

1731, 14 L.Ed.2d 601 (1965), and in 1B Moore, Federal Practice, ¶ 0.402 [3-2-1, et seq], pages 56-95.

Consequently, on occasion, when this Court has intended that its decisions would have only prospective or partially prospective application, it has included such a provision in the decision itself.[8]

However, the decision in *Del Costello* was not restricted in its application by this Court but was applied retroactively in both the *Flowers* and *Del Costello* cases, and the issue of retroactivity had been raised in the latter case. See 76 L.Ed.2d, at 496, n. 2. Furthermore, the intention of this Court that the *Del Costello* rule should apply to pending cases is shown by its own retroactive application of the rule in other cases.[9] See *Linkletter, supra*, 381 U.S., at 622 and n. 4.

It seems to us, therefore, that the Third, Fifth, Ninth and Eleventh Circuits were somewhat presumptuous in their *Perez, Edwards* [Fifth and Ninth], and *Rogers* decisions [10] in undertaking to apply the *Chevron v. Huson* analysis [11] to the *Del Costello* rule when this Court had already demonstrated its intention that the rule would

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[8] See, e.g., *Arizona Governing Committee v. Norris*, ____ U.S. ____, 77 L.Ed.2d 1236, 51 U.S.L.W. 5243 (July 6, 1983); *James v. United States*, 366 U.S. 213, 81 S. Ct. 1052, 6 L.Ed.2d 246 (1961). Also, *Great Northern R. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 53 S. Ct. 145, 77 L.Ed. 360, 366 (1932).

[9] Certiorari was granted and judgments were reversed, citing *Del Costello*, in *Teamsters Union v. Edwards*, ____ U.S. ____, 77 L.Ed.2d 1360, #82-1054, June 20, 1983; and *Hospital and Health Care Employees v. Assad*, ____. U.S. ____, 78 L.Ed.2d 73, #82-1975, October 3, 1983.

[10] Appendix of Decisions, *infra*.

[11] *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-7, 92 S. Ct. 349, 30 L.Ed.2d 296 (1971).

have "retroactive" application.[12]

Nevertheless, the Third, Fifth and Eleventh Circuits in undertaking that analysis gave proper weight to the second factor—the purpose of the rule in fostering the prompt dispatch of labor disputes and uniformity in the Federal regulatory scheme—which was so strongly emphasized by this Court in the *Del Costello* decision and properly held that the rule was applicable to pending cases in order to advance the purpose of the rule.

C. *Del Costello* Rule Was Not A Break From Established Precedent And Is No More Inequitable Than Any Other Rule Of Repose

The Third, Fifth and Eleventh Circuits correctly find in their *Perez* [718 F.2d, at 586], *Edwards* [720 F.2d, at 861 and 862], and *Rogers* [720 F.2d, at 1250] decisions that prior to *Del Costello* "a legally chaotic situation" was the rule, that there was no "clear past precedent" and that the purpose of *Del Costello* was to remedy the "inconsistent results" which were prevailing. Hence the six months rule was no break from well esrablished precedent.[13]

All statutes of limitation will be called inequitable by some, but praised by others. In *Del Costello* and in others of the cases listed in the Appendix of Decisions, *infra*, plaintiffs benefited by the reinstatement of cases which previously had been dismissed by the application of shorter periods of limitation than the new uniform six months rule.

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[12] Like the present case, none of these cases presented special facts showing reliance upon representations of the defendants with resulting delay in the instigation of the litigation, such as could create an equitable estoppel.

[13] Cf. *United Parcel Service v. Mitchell*, 451 U.S. 56, 101 S. Ct. 1559, 67 L.Ed.2d 732 (1981). Georgia has no statute of limitations *generally* applicable to arbitration awards.

Rules of repose, standing alone, do not present unconscionable situations of reliance on existing law or create estoppel by promise or contract. In other words, "equity" aids those who are vigilant and diligent and such rules are not "inequitable".

Therefore, application of the three factors delineated in *Chevron v. Huson* results, on all counts, in the conclusion that the *Del Costello* rule is applicable "retroactively" to pending cases.

CONCLUSION

For the reasons stated the petition for certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX OF DECISIONS

Del Costello Rule Retroactive

Second Circuit:

Assad v. Mt. Sinai Hospital, 725 F.2d 837 (2nd Cir., 1984), conforming to ___ U.S. ___, ___ S. Ct. ___, 78 L.Ed.2d 73, #82-1975, October 3, 1983);

Steelworkers Union v. Flowers, ___ U.S. ___, 103 S. Ct. 2281, 76 L.Ed.2d 476 (1983), reversing 671 F.2d 87 (2nd Cir., 1982).

Third Circuit:

Perez v. Dana Corporation, 718 F.2d 581 (3rd Cir., 1983);

Scott v. Teamsters Union Local 863, 725 F.2d 226 (3rd Cir., 1984).

Fourth Circuit:

Del Costello v. Teamsters Union, ___ U.S. ___, 103 S. Ct., 2281, 76 L.Ed.2d 476 (1983), reversing and remanding 679 F.2d 879 (4th Cir., 1982);

Murray v. Branch Motor Express Co., 723 F.2d 1146 (4th Cir., 1983).

Fifth Circuit:

Edwards v. Sea-Land Service, Inc., 720 F.2d 857 (5th Cir., 1983, conforming to ___ U.S. ___, ___ S. Ct. ___, 77 L.Ed.2d 1360, #82-1054, June 20, 1983);

Farr v. H. K. Porter Co., 727 F.2d 502 (5th Cir., 1984).

Sixth Circuit:

Curtis v. Teamsters Union Local 299, 716 F.2d 360 (6th Cir., 1983).

Seventh Circuit:

Storck v. Teamsters Union Local 600, 712 F.2d 1194 (7th Cir., 1983);

Metz v. Tootsie Roll Industries, 715 F.2d 299 (7th Cir., 1983), cert. den. 52 LW 3534, #83-819, Jan. 16, 1984;

Ernst v. Indiana Bell Telephone Co., 717 F.2d 1036 (7th Cir., 1983), cert. den. 52 LW 3509, #83-687, January 9, 1984.

Eighth Circuit:

Lincoln v. Machinists Union District Lodge 9, 723 F.2d 627 (8th Cir., 1983);

Vadasz v. Greyhound Lines, 723 F.2d 620 (8th Cir., 1983);

Stahlman v. Kroger Co., 723 F.2d 621 (8th Cir., 1983);

Arrow v. Pulitizer Publ. Co. (St. Louis Post-Dispatch), 723 F.2d 622 (8th Cir., 1983);

Askew v. F&W Express, Inc., 723 F.2d 624 (8th Cir., 1983);

Wilcoxen v. Kroger Co., 723 F.2d 626 (8th Cir., 1983);

Aarsvold v. Greyhound Lines, 724 F.2d 72 (8th Cir., 1984);

Andres v. Teamsters Union, 724 F.2d 73 (8th Cir., 1983);

Gustafson v. Cornelius Co., 724 F.2d 75 (8th Cir., 1983).

Eleventh Circuit:

Hand v. Chemical Workers Union, 712 F.2d 1350 (11th Cir., 1983);

Benson v. General Motors Corp., 716 F.2d 862 (11th Cir., 1983);

Rogers v. Lockheed Georgia Co., 720 F.2d 1247 (11th Cir., 1983);

Erkins v. Steelworkers Union, 723 F.2d 837 (11th Cir., 1984), cert. denied 52 LW 3888, #83-1866, June 11, 1984.

Del Costello Rule Prospective

Ninth Circuit:

Edwards v. Teamsters Union Local 36, 719 F.2d 1036 (9th Cir., 1983), cert. den. 52 LW 3687, #83-1211, March 19, 1984;

McNaughton v. Dillingham Corp., 722 F.2d 1459 (9th Cir., 1984), pet. for cert. filed, April 26, 1984, #83-1739;

Barina v. Gulf Trading & Transport Co., 726 F.2d 506 (9th Cir., 1984).

Del Costello Rule Acknowledged

District of Columbia Circuit:

Majewski v. B'nai B'rith International, 721 F.2d 823, 824, n. 3 (D.C. Cir., 1983).

First Circuit:

Derwin v. General Dynamics Corp., 719 F.2d 484, 487, 489 (1st Cir., 1983).